

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION LOCAL 28  
(CERES GULF, INC.)**

**and**

**Cases 16-CB-181716  
and 16-CB-194603**

**DONNA MARIE MATA, an individual**

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 28'S  
RESPONSE TO COUNSEL FOR THE GENERAL COUNSEL'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION  
AND BRIEF IN SUPPORT OF THE RESPONSE**

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## **ABBREVIATION KEY**

The April 3-4, 2017 Hearing Transcript is referred to as TR p.#, l.#.

The General Counsel's Exhibits are referred to as GC Ex. #.

International Longshoremen's Association Local 28's (Respondent) Exhibits are referred to as RESP Ex. #.

Specific page or paragraph numbers within exhibits are referred to, they are designated p. # or ¶ # respectively.

The Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions is referred to as GC Exceptions p. #.

The Administrative Law Judge's Decision of June 13, 2017 is referred to as ALJ Decision p. #, l. #.

## **TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:**

### **I. INTRODUCTION**

#### **A. The General Counsel's Analytical Framework is Wrong**

The analytical framework offered by the General Counsel for considering the Administrative Law Judge's ("ALJ") Decision is wrong. The ALJ did not find "that the Respondent did not violate the Act" by engaging in alleged conduct.<sup>1</sup> Rather, the ALJ found that International Longshoremen's Association, Local 28 ("Local 28") did not engage in the alleged conduct and, therefore, did not violate the Act.

The ALJ states, concerning Donna Mata's ("Mata") alleged denial of training:

... the General Counsel contended that Harris repeatedly sexually harassed Mata, and withheld training opportunities from her between March and August because she failed to accept his advances. As noted, I found that these facts were not established, and that Harris never groped, sexually harassed or propositioned her at any time; never prohibited her from being added to training certification lists between March and August; never barred her from receiving certification training during this period; and did not otherwise discriminate against her on the basis of her gender during this period ... I find, as a result, that the Union's actions were non-discriminatory, non-arbitrary, conducted in good faith, and reasonable. In sum, the General Counsel has failed to show that the Union breached its duty of fair representation regarding Mata's training requests.<sup>2</sup>

With regard to the coercion claim, the ALJ states, "The solicitation allegation, ..., also lacks merit."<sup>3</sup>

Unlike the General Counsel's framework, the ALJ did not start with a conclusion and then look for evidence. Rather, the ALJ properly analyzed the evidence and then reached a conclusion. That conclusion, as the ALJ succinctly states in his Conclusions of Law, was; "The Union did not violate the Act in any manner alleged in the complaint."<sup>4</sup>

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<sup>1</sup> GC Exceptions p. 8.

<sup>2</sup> ALJ Decision p. 6, l. 35-p. 7, l. 6.

<sup>3</sup> ALJ Decision p. 7, l. 14.

<sup>4</sup> ALJ Decision p. 7, l. 23.

## **II. SUMMARY OF THE ARGUMENT**

The ALJ's decision and means of making that decision were correct and should not be disturbed. The ALJ properly analyzed the evidence and, applying that evidence, dismissed Mata's complaint. The General Counsel's position depends on an assumption that a violation of law occurred rather than a demonstration of facts giving rise to a violation of law. The ALJ properly looked to the evidence before reaching a conclusion.

Michael Atwood's ("Atwood") testimony was properly discredited because of his own statements. Atwood offered assumptions as fact, impressions as evidence, and contradicted his own conclusions. Mata's demonstrated inaccuracies, obfuscations, and contradictory positions were properly seen by the ALJ as indicators of her credibility.

Mata's discrimination and harassment claims lack credible supporting evidence. The evidence showed Mata received training and jobs almost immediately on her return to the waterfront in 2015. Yet, Mata claims Local 28 denied her training months later because she rejected romantic advances prior to her return. The evidence also shows the training procedure followed by the involved parties and Mata's inability to follow that procedure. Further, when Mata finally brought her concerns to Local 28's attention, it immediately addressed them.

Mata also claims Local 28 sought to coerce her into withdrawing her charge. However, the evidence showed no such thing occurred. The evidence demonstrated that Mata regularly discussed her claims with a relative who is also a union officer and the individual she first brought her complaints to in June 2016. Rather than seeking to coerce Mata into dropping the charges, the evidence showed that Mata sought out and was presented with guidance. The ALJ refused to construe this as an effort to coerce or solicit Mata to withdraw her charge against Local 28.

### **III. ARGUMENT**

#### **A. Exception 8**

##### **1. *The ALJ's Determination that Michael Atwood's Testimony Deserves no Credence is Correct***

The General Counsel's Exception 8 starkly illustrates the fallacy of the offered analytical framework. The General Counsel asserts Atwood's testimony was not mere assumption but rather showed "actions"<sup>5</sup> by Local 28. It was Atwood himself who counters this because he testified it was his assumption that Donna Mata ("Mata") was discriminated against due to gender.

Atwood, called to bolster Mata's discrimination claims, was asked, "And why do you think that [Mata] was not awarded the training opportunity?" Atwood directly responded, "I would assume because she was a woman."<sup>6</sup> The General Counsel hoped the ALJ would make this same assumption. The ALJ did not.

Atwood admits his assumption is based only on what Mata reportedly told him, his own belief that other individuals obtained training Mata claimed to have sought, and that women obtained training through locals other than Local 28.<sup>7</sup> Because this fails to provide evidence of discrimination, the General Counsel points to "actions" Atwood claims to have observed.<sup>8</sup>

These "actions" were Atwood's claim that he observed two male casuals obtain employment rather than two female casuals. Atwood admits he has no idea why these

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<sup>5</sup> GC Exceptions p. 13.

<sup>6</sup> TR. p. 18, l. 12-16.

<sup>7</sup> TR p. 17, l. 17-24; TR p. 18, l. 17-23.

<sup>8</sup> GC Exceptions p. 13.



two men may have been dispatched.<sup>9</sup> Atwood acknowledges there may have been a basis other than gender at play in the dispatch; noting the individuals' training.<sup>10</sup>

Other factors also cut against Atwood's assumption. For example, Atwood testified that he, a male, encountered difficulty obtaining training through Local 28.<sup>11</sup> Atwood testified that an unnamed man starting soon after him with Local 28 obtained truck driving/yard tractor training "quicker than anybody [he'd] ever seen."<sup>12</sup> Similarly, Mata obtained yard tractor training through Local 28 within weeks of her May 14, 2015 return to the waterfront.<sup>13</sup> As such, the evidence demonstrated nothing supporting Atwood's assumption.

The ALJ did not ignore the alleged "actions" pointed to by the General Counsel. Rather, as the ALJ noted in rejecting Atwood's testimony, Atwood's testimony was "without substantiation," "conclusory," and "somewhat contradictory."<sup>14</sup> The ALJ was correct to afford Atwood's testimony no weight.<sup>15</sup> This is the only result possible when the proper analytical framework is applied; start with the evidence rather than with the desired conclusion.

## **B. Exceptions 6 and 7**

### **1. *Mata's Testimony was Correctly Discredited***

In Exceptions 6 and 7, the General Counsel excepts to the ALJ's credibility determinations concerning Mata.<sup>16</sup> Regarding Mata's credibility, The ALJ stated:

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<sup>9</sup> TR p. 30, l. 18-22.

<sup>10</sup> TR p. 30, l. 23-p. 31, l. 2; TR p. 31, l. 6-9.

<sup>11</sup> TR p. 25, l. 5-25.

<sup>12</sup> TR p. 21, l. 4-8; TR p. 21, l. 13-15; TR p. 21, l. 24-25.

<sup>13</sup> RESP Ex. 2; RESP Ex. 7, p. ILA28-00153.

<sup>14</sup> ALJ Decision n. 11.

<sup>15</sup> ALJ Decision n. 11.

<sup>16</sup> GC Exceptions p. 8-13.

For several reasons, I credit Harris. *First*, and foremost, Mata was a highly uncooperative witness who effortlessly answered virtually all of the General Counsel's direct examination queries, but then responded to equally simple cross-examination questions with delays, pauses, additional questions, recollection issues, and reported confusion. These repeated stonewalling activities rendered her unreliable. *Second*, the glaringly false statements in her ULP charge regarding Union work referrals further detracted from her credibility ... *Third*, the implausibility of several key parts of her story further undercuts her credibility ... *Fourth*, Mata's completely unsubstantiated claim that Pat McKinney, a non-Union employee, was a co-conspirator further undercuts her claims. *Finally*, Harris was a solid, cooperative, and believable witness.<sup>17</sup>

Ignoring the first, fourth, and fifth basis for the ALJ's decision not to credit Mata, the General Counsel takes issue with only the second and third. Thus, even if the second and third are ignored, ample bases remain for the ALJ's determination that Mata was not credible.

**2. Mata's "Glaringly False Statement" is Properly Considered in Assessing her Credibility**

It is troubling that the General Counsel takes issue with the ALJ's observation that Mata made "... glaringly false statements in her ULP charge regarding Union work referrals ..." This is particularly true given the General Counsel made the allegation of denial of jobs part of the opening statement.<sup>18</sup> Moreover, the charge complained of was offered into evidence by the General Counsel as GC Ex. 1(a).<sup>19</sup> It is more concerning that the General Counsel feels being accurate and truthful in a charge, is a "technicality" and "unreasonable."<sup>20</sup> Indeed, condoning inaccuracy and untruthfulness would create a far more dangerous precedent than that warned of by the General Counsel.<sup>21</sup>

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<sup>17</sup> ALJ Decision p. 4, l. 34-p. 5, l. 19 (italics original).

<sup>18</sup> TR. p. 7, l. 22-24.

<sup>19</sup> TR p. 6, l. 5-15.

<sup>20</sup> GC Exceptions p. 9.

<sup>21</sup> GC Exceptions p. 9.

More directly as applied to Mata's credibility, Mata signed her charge on August 1, 2016.<sup>22</sup> In signing, Mata affirmatively "...declared that [Mata] read the above charge and that the statements therein are true to the best of [Mata's] knowledge and belief."<sup>23</sup> Moreover, "Willful false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)."<sup>24</sup> There is no question that accuracy and truth were expected of Mata. That someone else may have written the allegation does not excuse Mata's false declaration. In fact, it makes it more glaring because Mata expressly declared not that she had written the charge but that she had "... read the above charge ..."<sup>25</sup> An assertion that the ALJ should have overlooked Mata's false declaration is wrong. The ALJ is tasked with determining credibility and lies; technical, white, or otherwise, are directly germane to that determination. It is imminently reasonable that the ALJ recognized this.

Perhaps if Mata's "glaringly false statement" stood alone, the General Counsel's position might have some attraction. However, as the ALJ notes, this was but one of several factors impacting the determination of Mata's credibility. Moreover, it was not as if Mata overlooked a limited number of jobs. Mata obtained employment through Local 28 forty-five separate times between February 5, 2016 and August 5, 2016.<sup>26</sup> Prior to signing the declaration on Monday, August 1, 2016, Mata's most recent employment ended on Friday, July 29, 2016; a span of only three days.<sup>27</sup> Mata's declaration was no mere technical oversight. Mata was either lying, exaggerating, or exhibiting a concerning lack of recollection. Any of these are informative as to Mata's credibility and

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<sup>22</sup> GC Ex. 1(a).

<sup>23</sup> GC Ex. 1(a).

<sup>24</sup> GC Ex. 1(a).

<sup>25</sup> GC Ex. 1(a).

<sup>26</sup> Resp. Ex. 7, pp. ILA28-000150-51.

<sup>27</sup> Resp. Ex. 7, pp. ILA28-000150-51.

the ALJ was entitled to and quite reasonably took Mata's false declaration into consideration in addressing her credibility.

**3.     *The ALJ was Correct in Determining Mata's Testimony Implausible***

The ALJ determined several key parts of Mata's story were implausible. The ALJ found Mata's testimony to be implausible based on the evidence. The ALJ, who heard and observed Mata testify, simply did not believe Mata.

The General Counsel does not argue that the ALJ erred based on the record. Rather, the General Counsel asserts the ALJ himself engages in "sexual stereotyping" and "bias" and made a "discriminatory leap."<sup>28</sup> The General Counsel, while complaining of the ALJ's "extra-record" conclusions, offers extra-record irrelevant news reports, neither offered nor admitted into evidence and consisting and comprising of hearsay, in an effort to show this bias. These news articles and the conclusions offered by the General Counsel from them should not have been considered by the ALJ and should not be considered now. The articles and conclusions have no bearing on the plausibility of Mata's testimony.

Moreover, the General Counsel's argument is premised on sexual harassment having taken place. The General Counsel once more begins with the desired conclusion and then attempts to back-fill. But, as the ALJ determined:

... the General Counsel contended that Harris repeatedly sexually harassed Mata, ... As noted, I found that these facts were not established, and that Harris never groped, sexually harassed or propositioned [Mata] at any time ...<sup>29</sup>

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<sup>28</sup> GC Exceptions p. 11.

<sup>29</sup> ALJ Decision p. 6, l. 35-38.

## **C. Exceptions 1 and 2**

### **1. *The ALJ's Findings and Conclusions Contrary to Mata's Discrimination Claim are Correct***

The General Counsel does not provide a specific argument in support of its Exceptions 1 and 2. Rather, the General Counsel provides a conclusion entitled “Background” and a summary of what it believes to be the “Pertinent Facts.”<sup>30</sup> The General Counsel does not point to some specific error by the ALJ. The ALJ did not miss the evidence. The ALJ based his decision on the evidence and that evidence did not support Mata’s conclusion.

In its post-trial brief, Local 28 extensively referred the ALJ to the evidence relevant to this matter.<sup>31</sup> Rather than repeat that here, Local 28 calls attention to specific matters as organized by the General Counsel in its Exceptions.

#### **a. *Hiring Hall Procedure-Training and Job Referrals***

The General Counsel references only Atwood and Mata’s testimony in describing training and job referral practices. Such limited offering results in a myopic and narrow view not engaged in by the ALJ. Rather, the ALJ was presented with and took note of extensive countering evidence.

For example, Tim Harris (“Harris”) does not allow or deny training at his discretion. The West Gulf Maritime Association (“WGMA”), not Local 28, oversees training.<sup>32</sup>

As part of [its] administration, the West Gulf Maritime Association coordinates training on waterfront safety and policies, coordinates hands-on training in equipment, issues equipment certifications according to federal requirements, and manages training records.<sup>33</sup>

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<sup>30</sup> GC Exceptions p. 2-7.

<sup>31</sup> International Longshoremen’s Association Local 28’s Post-Hearing Brief (see generally).

<sup>32</sup> RESP Ex. 3.

<sup>33</sup> RESP Ex. 3, p. ILA28-000021.

WGMA, not Local 28, tracks and maintains certifications.<sup>34</sup>

A third party entity, Tri-Kin Enterprises (“Tri-Kin”), provided powered industrial equipment and truck (“PIT”) training on behalf of the WGMA to union locals from Lake Charles, Louisiana to Brownsville, Texas.<sup>35</sup> This included Local 28.<sup>36</sup>

Training classes are assigned by WGMA.<sup>37</sup> “All classes are open to all qualified union workers. The class schedule is communicated via a monthly calendar posted on the [WGMA] website.”<sup>38</sup>

Harris, of Local 28, does not tell Tri-Kin who will be in these classes.<sup>39</sup> Individual unions send sign up lists to WGMA which then vets the individuals listed and assigns individuals to a class.<sup>40</sup> Class sizes are limited.<sup>41</sup> As Mata concedes, only if class spaces are available would Harris place an individual on the list submitted to the WGMA.<sup>42</sup> Additionally, regular employees who are specifically requested for training by an employer have priority over individuals who may be submitted by Local 28.<sup>43</sup> In addition, WGMA assigns a certain number of class slots to each of the various locals served<sup>44</sup> A stand-by list may also be maintained allowing a student to attend if open slots arise.<sup>45</sup>

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<sup>34</sup> RESP Ex. 3, p. ILA28-000040.

<sup>35</sup> TR p. 237, l. 10-22; TR p. 239, l. 1-5.

<sup>36</sup> TR p. 237, l. 23-25; For the past 36 years, Patrick McKinney (“McKinney”) has been with Tri-Kin. It is McKinney whom Mata claims was part of a conspiracy to discriminate against her by Local 28 because he refused to allow her to participate in hands-on-training while she was ill in August 2016.

<sup>37</sup> TR p. 239, l. 6-14.

<sup>38</sup> RESP Ex. 3, p. ILA28-000022.

<sup>39</sup> TR p. 255, l. 18-21.

<sup>40</sup> TR p. 239, l. 6-14.

<sup>41</sup> TR p. 242, l. 9-11.

<sup>42</sup> TR p. 49, l. 2-8.

<sup>43</sup> TR p. 175, l. 5-10; TR p. 298, l. 14-17; TR p. 299, l. 17-18.

<sup>44</sup> TR p. 241, l. 20-p. 242, l. 3; TR p. 175, l. 16-p. 176, l. 12.

<sup>45</sup> TR p. 241, l. 11-17.

With regard to Local 28's procedures, when the WGMA training dates are available, Harris announces the schedule. This is done at the end of the month prior to the month of the scheduled classes.<sup>46</sup> This is done, in part, because the WGMA changes the schedule at times.<sup>47</sup> If Harris knows a class to be full, he informs the individual of that fact.<sup>48</sup> Harris collects names of those making themselves available for the classes.<sup>49</sup> Harris then sends that information to WGMA which prepares the actual list of attendees.<sup>50</sup>

During 2016, Forklift and Heavy Lift training classes were well attended.<sup>51</sup> Classes for Forklift and Heavy Lift were offered in Houston, Texas once a month, generally in the first two weeks of the month.<sup>52</sup> The hands on portion of the certification process is scheduled during the class room portion.<sup>53</sup> Like the classroom portion, Local 28 has nothing to do with scheduling the hands on portion.<sup>54</sup> If an individual misses a classroom portion, they must wait 60 days to retake the class.<sup>55</sup> If an individual misses a hands on class, WGMA mandates they are ineligible to attend the class for 150 days.<sup>56</sup> If there is an emergency or some other excusable factor causing the absence, the individual may be excused from the 150 days waiting period.<sup>57</sup>

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<sup>46</sup> TR p. 39, l. 15-21; TR p. 42, l. 21-25.

<sup>47</sup> TR p. 41, l. 22-p. 42, l. 1.

<sup>48</sup> TR p. 40, l. 12-24.

<sup>49</sup> TR p. 39, l. 25-p. 40, l. 4; TR p. 43, l. 8-19.

<sup>50</sup> TR p. 40, l. 5-11.

<sup>51</sup> TR p. 242, l. 4-9.

<sup>52</sup> TR p. 242, l. 10-14; RESP. Ex. 9; GC Ex. 3.

<sup>53</sup> TR p. 242 l. 15-p. 243, l. 7.

<sup>54</sup> TR p. 242, l. 8-10.

<sup>55</sup> RESP Ex. 3, p. ILA28-000024.

<sup>56</sup> TR p. 244, l. 23-p. 245 l. 6; RESP. Ex. 3, p. ILA28-000024.

<sup>57</sup> TR p. 245, l. 7-12.

***b. Tim Harris Awarding Job and Training Opportunities to Men over Women***

The General Counsel's assertion that Harris discriminates against women generally and Mata specifically, proved unconvincing to the ALJ. The General Counsel again points exclusively to Atwood's and Mata's testimony but ignores the conflicting testimony offered by each. Atwood testified he observed women obtain employment through Local 28 both as casuals and under the seniority system.<sup>58</sup> As already discussed, Atwood provided testimony showing that men and women had similar experiences in obtaining training and failed to offer credible evidence that Local 28 favored men over women in providing training lists to WGMA. Mata herself conceded women were placed on training lists.<sup>59</sup>

It is misleading for the General Counsel to imply Mata has been prevented from working or "receiving" work since 2001. First Mata had training certifications in Yard Tractor and Forklift as of April, 2007.<sup>60</sup> Mata obtained Lashing certification in January 2008 and HazMat certification in April 2010.<sup>61</sup> Second, the evidence does not demonstrate what Mata's employment history is prior to 2007. Even so, we know that from November 2007 through June 2010, Mata was employed as a truck driver in Iraq.<sup>62</sup> On her return, Mata was employed full time by various trucking companies until February 2015.<sup>63</sup> Third, Mata only worked a total of 1,412.50 hours with several locals since March 2007; even after she held the certifications she complains of lacking in this

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<sup>58</sup> TR p. 29, l. 16-p. 30, l. 1.

<sup>59</sup> TR p. 52, l. 3-7.

<sup>60</sup> RESP. Ex. 2.

<sup>61</sup> RESP. Ex. 2.

<sup>62</sup> TR p. 76, l. 24- p. 77, l. 9.

<sup>63</sup> TR p. 77, l. 10-p. 78, l. 4; TR p. 79, l. 15-20.



case.<sup>64</sup> Even in 2016, Mata's presence at Local 28's hiring hall was sporadic.<sup>65</sup> Mata's work history does not lend itself to a determination that Local 28 has somehow prevented her from obtaining seniority or employment.

The ALJ had ample evidence on which to reject the General Counsel's conclusion that Local 28 favored men over women in employment and training opportunities.

***c. Between March and August 2016 Mata Sought Additional Certifications***

***and***

***d. From March to August 2016 Mata was Denied Training Opportunities which were Simultaneously Offered to Men***

On her return to Local 28 in May 2015, Mata obtained, without apparent incident, Longshore Skills and HazMat certification on June 8, 2015, Yard Tractor certification on June 11, 2015, and passed her physical on July 6, 2015.<sup>66</sup> Since that time, Mata accepted truck driving jobs almost exclusively.<sup>67</sup> This held true even after Mata obtained certification on Ro/Ro, Forklift, and Heavy Lift in August and September 2016.<sup>68</sup> It also held true when Mata obtained employment through International Longshoremen's Association Local 24.<sup>69</sup>

Harris recalls Mata seeking training on her return in 2015.<sup>70</sup> Setting a pattern, by the time Mata approached Harris requesting training, many of the courses had already occurred for the month and the Yard Tractor course was already "capped out."<sup>71</sup> Despite this, on June 5, 2015 Harris sent an e-mail to Judith Brown, the WGMA individual

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<sup>64</sup> RESP Ex. 7.

<sup>65</sup> TR p. 271, l. 21-25.

<sup>66</sup> RESP Ex. 7, p. ILA28-000153; RESP Ex. 2.

<sup>67</sup> TR p. 46, l. 10-21; TR p. 95, l. 4-7; TR p. 178, l. 13-20; RESP Ex. 7 pp. ILA28-000147-53; RESP. Ex. 6.

<sup>68</sup> See RESP Ex. 7 pp. ILA28-000147-53; RESP. Ex. 6; RESP. Ex. 2.

<sup>69</sup> See RESP. Ex. 7 p. ILA28-000148 (December 29, 30, 2016, January 3, 2017).

<sup>70</sup> TR p. 296, l. 20-p. 297, l. 14.

<sup>71</sup> TR p. 300, l. 13-17.

responsible for compiling class lists, informing her that Mata would stand-by for the Yard Tractor course.<sup>72</sup>

Harris recalls additional occurrences when Mata inquired about training.

The first occurrence was at the conclusion of a general union meeting on October 7, 2015.<sup>73</sup> Mata is reflected to have attended.<sup>74</sup> Meetings were held the first or second week of the month and by that time, classes were either full or concluded.<sup>75</sup> In October 2015, RoRo and Forklift training occurred on October 6, 2015, the day after the meeting.<sup>76</sup> Thus, there was no opportunity to attend these classes until the following month.<sup>77</sup> Heavy Lift training was scheduled for October 8, 2015.<sup>78</sup> Harris had already submitted the list for Heavy Lift training because they are sent to WGMA forty-eight hours prior to the scheduled class.<sup>79</sup> As a result, Harris told Mata to get back to him for the following month.<sup>80</sup>

Mata's other option was to go to the WGMA the day of the class and attempt to attend as a stand-by.<sup>81</sup> This, is what she did in June 2015 when she previously belatedly sought training. In response to a third belated request by Mata in 2016, which was made the day of a class, Harris suggested this to Mata.<sup>82</sup> Harris does not know whether Mata attempted to attend or not.<sup>83</sup>

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<sup>72</sup> RESP Ex. 13; TR p. 296, l. 25-p. 297, l. 14; TR p. 298, l. 5-p. 29, l. 4.

<sup>73</sup> TR p. 302, l. 18-p. 303, l. 5; TR p. 304, l. 25-p. 305, l. 3.

<sup>74</sup>; RESP Ex. 12, p. ILA28-000165.

<sup>75</sup> TR p. 303, l. 6-15.

<sup>76</sup> RESP Ex. 18, p. ILA28-000199.

<sup>77</sup> The General Counsel asserts classes were held "approximately 5" times each month. This is a glaring exaggeration. Numerous classes were offered. However, these were of different types and offered in locations ranging from Lake Charles, Louisiana to Brownsville, Texas, a distance of nearly 500 miles. RESP. Ex. 9. Each class was generally offered only one time per month in any specific location.

<sup>78</sup> RESP Ex. 18, p. ILA28-000199.

<sup>79</sup> TR p. 312, l. 6-10.

<sup>80</sup> TR p. 303, l. 14-15.

<sup>81</sup> TR p. 3312, l. 11-p. 313, l. 10.

<sup>82</sup> TR p. 313, l. 11-20.

<sup>83</sup> TR p. 313, l. 17-20.

Critically, Mata offered nothing to support her claim that she was repeatedly denied training due to her gender. Instead, the evidence showed a pattern of late inquiries and a refusal or inability to follow the procedures successfully followed by others; male and female.

Mata claims, however, that she was discriminatorily denied placement “four to six times every month” between March and August 2016.<sup>84</sup> As evidenced by Mata’s three belated efforts *supra*, she was not prone to following the process. As Harris noted, he only prepares lists once a month because the WGMA schedule often changes, individuals don’t plan that far ahead, and addressing scheduling at a bulk hire allows him to catch the most workers.<sup>85</sup> Thus, if Mata did not take it upon herself to timely seek inclusion on a training list, she would not have been listed.

Regardless, Mata offered several occurrences she contends evidence discrimination. Mata testified she was told she could get plenty of truck driving work, that truck driving jobs pay better, and that she should have her husband work through the Local so the family would have two incomes.<sup>86</sup> None of this evidences discrimination.

As detailed *supra*, even with additional certifications, Mata accepted truck driving jobs regularly and almost exclusively.<sup>87</sup> Truck driving jobs were more plentiful and regular.<sup>88</sup> Truck driving jobs did, in fact, pay better than forklift jobs.<sup>89</sup> Additionally, a significant reduction in employment occurred during 2015-2016 due to a

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<sup>84</sup> TR p. 49, l. 9-15.

<sup>85</sup> TR p. 303, l. 24-p. 304, l. 9.

<sup>86</sup> TR p. 50, l. 23-p. 51, l. 1; TR p. 57, l. 24- p. 58, l. 4; TR p. 58, l. 4- p. 59, l. 25.

<sup>87</sup> RESP Ex. 7.

<sup>88</sup> TR p. 199, l. 1-20.

<sup>89</sup> RESP Ex. 7 (compare the July 10, 2015 forklift job (314) paying \$232.00 for 8 hours (\$29.00 per hour), the July 14, 2015 truck driver job (321) paying \$66.50 for 2 hours (\$33.50 per hour), the truck driver job (321) on July 24, 2015 paying \$266.00 for 8 hours (\$33.25 per hour), and the August 7, 2015 truck driver job (241) paying \$234.00 for 8 hours (\$29.25 per hour).

slow-down in the steel industry resulting in reduced steel shipments through the Port of Houston.<sup>90</sup> This slow-down did not alleviate until the first quarter of 2017.<sup>91</sup> Even so, truck driving positions, especially for individuals with Commercial Drivers Licenses such as Mata, saw a slight increase in job availability.<sup>92</sup>

It is obvious that if Mata's husband chose to work, the family would enjoy two incomes.

The only reason expressed which even remotely touches on alleged gender perception is Mata's claim that she was told that non-truck driving jobs were "grimy, dirty jobs and it's too much physical work."<sup>93</sup> However, to portray this alleged comment as anything other than a general observation or stray remark, assuming such a remark was made, requires a leap far exceeding the reach of the evidence.<sup>94</sup>

***e. Mata's Claim that Tim Harris Sexually Assaulted Her***

Mata alleges Harris "sexually assaulted" her and retaliated against her rejection by denying her training. The ALJ determined the allegation was untrue.<sup>95</sup> While the General Counsel attributes this to "sexual stereotyping" and "bias," the evidence supports the ALJ's conclusion.

Mata claims that beginning in 2010, Harris attempted to "grab on me" in a "never ending cycle" over a nearly five-year period.<sup>96</sup> Mata alleges these events occurred during meetings between 2010 and 2015 in which she claims to have sought training.<sup>97</sup> Mata

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<sup>90</sup> TR p. 196, l. 16-p. 197, l. 14.

<sup>91</sup> TR p. 197, l. 15-25.

<sup>92</sup> TR p. 199, l. 1-20; TR p. 293, l. 17-p. 294, l. 3.

<sup>93</sup> TR p. 51, l. 8-11.

<sup>94</sup> See *Jackson v. Cal-Western Pac kaging Corp.*, 602 F.3d 374, 380 (5<sup>th</sup> Cir. 2010).

<sup>95</sup> ALJ Decision p. 7.

<sup>96</sup> TR p. 85, l. 18- p. 86, l. 1; TR p. 87, l. 8-13.

<sup>97</sup> TR p. 60, l. 4-13; TR p. 60, l. 14-16; TR p. 60, l. 22-25.

testified the last time this occurred was in 2015, “after Easter, right before Mother’s Day.”<sup>98</sup> Easter fell on April 5, 2015 and Mother’s Day was May 10, 2015.<sup>99</sup>

Mata’s first day of employment through Local 28 since 2007 occurred on May 14, 2015.<sup>100</sup> Mata received Longshore and HazMat certification on June 8, 2015, Yard Tractor class room certification on June 11, 2015, and Yard Tractor hands on certification on June 30, 2015.<sup>101</sup> By June 30, 2015, Mata had obtained five dispatches for employment through Local 28.<sup>102</sup> Thus, just weeks after the last alleged event occurred, Mata was trained and employed.

This evidence shows that no retaliation occurred as Mata obtained training and employment immediately after she alleges she last rejected Harris. While Mata asserts she was denied training between February and August 2016 in retaliation for her prior rejections, in addition to there being no evidence of any “assault” during that period, the only evidence of a denial of training is Mata’s unsubstantiated claims. This is called into question, however, by Mata’s training and employment experiences in May and June 2015 as described *supra*. Mata sought to convince the ALJ that, while the evidence shows no retaliation occurred immediately after she claims to have last rejected advances, retaliation occurred some eight to fourteen months later. The ALJ was not convinced.

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<sup>98</sup> TR p. 60, l. 17-21.

<sup>99</sup> Respondent respectfully requests the Administrative Law Judge take Judicial Notice of these dates pursuant to Federal Rule of Evidence 201 as made applicable by 29 C.F.R. § 102.39.

<sup>100</sup> RESP. Ex. 7 p. ILA28-000153; RESP Ex. p, ILA128-000124.

<sup>101</sup> RESP Ex. 2; TR p. 94, l. 17-p. 95, l. 3.

<sup>102</sup> RESP Ex. 7, p. ILA28-00153 (May 14-June 23, 2015).

***f. Mata's Report to Local 28***

***and***

***g. Local 28's Response***

Mata did not report Harris' alleged conduct to Local 28 until June 2016; over a year after she claims it last occurred.<sup>103</sup> Mata makes an uncorroborated claim that she told Jessie San Miguel, Sr., at some point in 2010. There is no corroborating evidence of this claim. Further, prior to February 2015, Mata was employed in Iraq or full time by various trucking companies.<sup>104</sup> These were not jobs obtained through Local 28.<sup>105</sup>

What is corroborated is that on June 30, 2016, Mata told Jessie San Miguel, Jr, ("San Miguel, Jr.") who, in turn, reported the allegation to Local 28's president, Larry Sopchak, on July 1, 2016.<sup>106</sup> At the time, Mata did not mention anything about being denied training or any other conduct.<sup>107</sup>

On learning of the allegations on July 1, 2016, Sopchak requested San Miguel, Jr. contact Mata to set up a meeting to address them.<sup>108</sup> Mata, San Miguel, Jr. and B.R. Williams, Local 28's Executive Vice President, attended the meeting.<sup>109</sup> Even during that meeting, Mata did not mention denial of training or certification opportunities to Sopchak's recollection.<sup>110</sup> Mata was also invited, if she so chose, to have the WGMA address her harassment charges independently.<sup>111</sup> Mata declined.<sup>112</sup>

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<sup>103</sup> TR p. 61, l. 1-19.

<sup>104</sup> TR p. 77, l. 10-p. 78, l. 4; TR p. 79, l. 15-20.

<sup>105</sup> TR p. 78, l. 5-9.

<sup>106</sup> TR p. 61, l. 10-20; TR p. 263, l. 24-p. 265, l. 10; TR p. 172, l. 22-24; TR p. 212, l. 24-p. 213, l. 2.

<sup>107</sup> TR p. 265, l. 18-25; p. 213, l. 3-17; TR p. 214, l. 16-20.

<sup>108</sup> TR p. 216, l. 5-16.

<sup>109</sup> TR p. 214, l. 21-p. 215, l. 10.

<sup>110</sup> TR p. 215, l. 18- p. 217, l. 1; TR p. 217, l. 16-22.

<sup>111</sup> TR p. 123, l. 20-p. 124, l. 10.

<sup>112</sup> TR p. 224, l. 1-10.

A second meeting to address Mata's allegations was held on July 6, 2016.<sup>113</sup> That meeting primarily involved Mata and Local 28's counsel, Eric Nelson ("Nelson").<sup>114</sup> Sopchak attended the preliminary portion of the meeting but removed himself to provide a more comfortable venue for Mata.<sup>115</sup>

During the meetings, Mata expressed a desire to obtain training but did not want to work through Harris.<sup>116</sup> Mata also wanted an adjustment to her pay level.<sup>117</sup> Mata was told Local 28 would try to get her into the next available training classes and that she could speak with San Miguel, Jr. or any Local 28 official other than Harris concerning training.<sup>118</sup>

Local 28 secured a spot for Mata in a July 8, 2016 Forklift training class, notifying Mata through San Miguel, Jr. on July 7, 2016.<sup>119</sup> Despite being afforded this opportunity, Mata declined, asserting she was unable to attend on short notice.<sup>120</sup> The next opportunities for Ro-Ro training did not arise until August 2, 2016 and training in Forklift and Heavy Lift would not occur again until August 4, 2016.<sup>121</sup> Mata availed herself of these opportunities.<sup>122</sup> In contrast to the evidence, Mata asserts that after these meetings she "never heard anything back at all."<sup>123</sup>

Despite Local 28's efforts and her attendance in classes just prior, on August 5, 2016, Mata filed Charge Number 16-CB-181716 against Local 28 asserting it had

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<sup>113</sup> TR p. 218, l. 12-23.

<sup>114</sup> TR p. 218, l. 12-23.

<sup>115</sup> TR p. 218, l. 12-p. 219, l. 6.

<sup>116</sup> TR p. 267, l. 13-22.

<sup>117</sup> TR p. 263, l. 29-22.

<sup>118</sup> TR p. 267, l. 23-p. 268, l. 6; TR p. 216, l. 17-p. 217, l. 2; TR p. 217, l. 9-15; TR p. 217, l. 23-p. 218, l. 2.

<sup>119</sup> RESP Ex. 21, p. ILA28-000218; TR p. 212, l. 1-8; RESP Ex. 9, p. ILA28-000141; TR p. 156, l. 11-24.

<sup>120</sup> RESP Ex. 21, p. ILA28-000218.

<sup>121</sup> RESP Ex. 9, p. ILA28-000142; TR p. 133, l. 5-25; TR p. 134, l. 19-23.

<sup>122</sup> RESP Ex. 2; TR p. 95, l. 8-p. 96, l. 2.

<sup>123</sup> TR p. 63, l. 9-14. The General Counsel describes this as "fail[ing] to address the reporting." GC Exceptions p. 6.

unlawfully refused to allow her on the “certification list.”<sup>124</sup> As a result, on the day Mata filed her charges against Local 28 asserting it prevented her from obtaining training, she had turned down the opportunity to attend one class in July 2016, had taken the first available classes since she brought the matter to Local 28’s attention, and was scheduled for the hands-on portions of the classes she alleged Local 28 prevented her from attending.

While Mata attended RoRo class room training on August 2, 2016 and Forklift and Heavy Lift training on August 4, 2016, she was ill on the first day of hands-on training, August 8, 2016.<sup>125</sup> Mata agrees she was ill on August 8, 2016.<sup>126</sup> Mata was told by McKinney to go home and, when she was well, he would reschedule her.<sup>127</sup> Mata was offered slots in hands on classes in Fork Lift, RoRo, and Heavy Lift on August 17, 2016. Through San Miguel, Jr., Mata declined.<sup>128</sup>

Mata’s portrayal of this event is that, while she did vomit, she was not sick, and McKinney refused to permit her to attend the hands-on classes.<sup>129</sup> In order to connect this event to the alleged discrimination, Mata attributes McKinney’s refusal to Local 28.<sup>130</sup> No one with Local 28 requested McKinney prevent Mata from completing her hands-on certifications.<sup>131</sup> McKinney was solely responsible for sending Mata home due to her illness.<sup>132</sup> In addition to protecting the other students and the equipment,

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<sup>124</sup> GC Ex. 1(a); TR p. 97, l. 3-17.

<sup>125</sup> RESP Ex. 2; TR p. 247, l. 12-21; TR p. 248, l. 18-p. 249, l.2; RESP Ex. 10. TR p. 247, l. 12-21; TR p. 248, l. 18-p. 249, l.2; RESP Ex. 10.

<sup>126</sup> TR p. 101, l. 23-p. 102, l. 2.

<sup>127</sup> TR p. 247, l. 12-21.

<sup>128</sup> RESP Ex. 10 p. ILA28-000004; TR p. 251, l. 22-p. 252, l. 5; p. 252, l. 16-22; p. 252, l. 23-p. 253 l. 3; TR p. 279, l. 9-p. 280 l. 3.

<sup>129</sup> TR p. 103, l. 11-18.

<sup>130</sup> TR p. 104, l. 12-16.

<sup>131</sup> TR p. 249, l. 20-p. 250, l. 6.

<sup>132</sup> TR p. 250, l. 11-13.



McKinney wanted Mata to be in be in “tip top” shape because if she failed, she was required to wait 60 days to try again.<sup>133</sup>

It is apparent that, despite Mata’s claims, Local 28 immediately addressed her claims and took concrete steps to assist Mata once it was made aware. There is, quite simply, no basis for a claim that Local 28 failed to address Mata’s stated concerns when it learned of them at the end of June 2016.

#### **D. Exceptions 3 and 4**

##### **1. *The ALJ’s Findings and Conclusions Contrary to Mata’s Solicitation/Coercion Claim are Correct***

Mata alleged Local 28 attempted, through San Miguel, Jr., to coerce her into withdrawing her discrimination charge.<sup>134</sup> The ALJ found the coercion allegation had no credence.<sup>135</sup> The General Counsel asserts this determination is factually and legally wrong in Exceptions 3 and 4.<sup>136</sup> The ALJ’s decision derives directly from the credible evidence.

Mata and San Miguel, Jr. have known each other for years and are related.<sup>137</sup> Mata routinely communicated with San Miguel, Jr. concerning union and personal matters; including her discrimination claim against Local 28.<sup>138</sup> In fact, as noted by the ALJ, Mata first brought her complaints concerning Harris to San Miguel, Jr. on June 30, 2016.<sup>139</sup> Heedless that Mata herself brought San Miguel, Jr. into the matter and regardless of their relationship and routine discussions, Mata claims San Miguel, Jr. attempted to coerce her through five communications.

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<sup>133</sup> TR p. 254 l. 18-p. 255 l. 5.

<sup>134</sup> GC Ex. 1(f); The General Counsel also refers to this claim at various times as solicitation.

<sup>135</sup> ALJ Decision, p. 7, l. 10-14.

<sup>136</sup> GC Exceptions p. 1 (Exception 3); GC Exceptions p. 6-8.

<sup>137</sup> TR p. 63, l. 15-18; TR p. 125, l. 5-20; TR p. 260, l. 12-16.

<sup>138</sup> TR p. 63, l. 19-25; TR p. 124, l. 25-p. 125, l. 3; TR p. 132, l. 10-p. 133, l. 4.

<sup>139</sup> TR p. 61, l. 10-20; TR p. 263, l. 24-p. 265, l. 10; TR p. 172, l. 22-24; TR p. 212, l. 24-p. 213, l. 2.

Mata asserts that an August 3, 2016 text from San Miguel, Jr. began the coercive effort despite the fact that it predated the filing of her charge.<sup>140</sup> Obviously, San Miguel, Jr. could not know of a charge which had not yet been filed.<sup>141</sup>

Mata testified the second communication occurred during a five-minute conversation on December 7, 2016, in which San Miguel, Jr. allegedly inquired “if I would – if I’d dropped the charges or if I’m going to keep the charges.”<sup>142</sup> Mata asserts she told San Miguel, Jr. “I don’t believe I would drop the charges.”<sup>143</sup> There was no further conversation reported by Mata.<sup>144</sup>

A third communication allegedly occurred the next day, December 8, 2016.<sup>145</sup> During another five-minute conversation, Mata asserts San Miguel, Jr. asked her if she had contacted the NLRB to drop the charges.<sup>146</sup> Mata asserts she replied she had tried but had not been able to “get through.”<sup>147</sup>

Mata testified of a fourth communication on December 15, 2016.<sup>148</sup> Mata received another text message inquiring whether she had “gone down to withdraw the charges at the Labor Board.”<sup>149</sup>

Mata referenced a fifth communication with San Miguel, Jr. in February 2017.<sup>150</sup> During that conversation, Mata asserts San Miguel, Jr. again inquired about her dropping the charges and Mata replied, “no, I haven’t been able – I’ve been trying to get

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<sup>140</sup> GC Ex. 5; TR p. 126, l. 1-23.

<sup>141</sup> GC Ex. 5; TR p. 270, l. 18-22.

<sup>142</sup> TR p. 70, l. 3-5; TR. p. 68, l. 1-15.

<sup>143</sup> TR p. 68, l. 17-19.

<sup>144</sup> TR p. 70, l. 6-8.

<sup>145</sup> TR p. 70, l. 9-14.

<sup>146</sup> TR p. 71, l. 1-6; TR. p. 69, l. 25-p. 70, l. 2 (Mata testified that her meetings “usually” lasted “about five minutes.”).

<sup>147</sup> TR p. 71, l. 1-6.

<sup>148</sup> TR p. 71, l. 12-17.

<sup>149</sup> TR p. 71, l. 12-17.

<sup>150</sup> TR p. 72, l. 10-19.

a hold of Laurie [Duggan-counsel for the NLRB] for a while already because I needed to talk to her about stuff. And I just haven't been able to get through, ..." <sup>151</sup> It was during this communication that Mata alleges San Miguel, Jr.'s took a job dispatch from her <sup>152</sup>

One notable observation concerning Mata's testimony is its inconsistency. For example, on December 7, 2016 Mata claims she told San Miguel, Jr. "I don't believe I would drop the charges." <sup>153</sup> Despite this, the next day Mata claims San Miguel, Jr. asked if she contacted the NLRB to drop the charges. <sup>154</sup> Rather than reiterate her alleged statement from the prior day, Mata responded she had tried but had not been able to "get through." <sup>155</sup> Moreover, Mata was unable to offer corroborating evidence supporting her claims.

As recognized by the ALJ, and contrary to Mata, San Miguel Jr. provided consistent and corroborated testimony which resulted in a determination adverse to Mata. <sup>156</sup>

San Miguel, Jr. recalls discussions with Mata concerning her NLRB charge beginning in December 2016. <sup>157</sup> It was not until an NLRB settlement proposal was discussed among Local 28's Executive Board at an annual appreciation dinner that San Miguel, Jr. discussed the matter with Mata. <sup>158</sup> The conversations with Mata arose because San Miguel, Jr.'s father, Jesse San Miguel, Sr., was identified by name in Mata's

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<sup>151</sup> TR p. 73, l. 6-17.

<sup>152</sup> TR p. 72, l. 17-25. San Miguel, Jr. has no recollection of taking work ticket from Mata. TR. p. 261, l. 11-14.

<sup>153</sup> TR p. 68, l. 17-19.

<sup>154</sup> TR p. 71, l. 1-6; TR. p. 69, l. 25-p. 70, l. 2 (Mata testified that her meetings "usually" lasted "about five minutes.").

<sup>155</sup> TR p. 71, l. 1-6.

<sup>156</sup> ALJ Decision p. 6, l. 10-13.

<sup>157</sup> TR p. 273, l. 20-24; TR p. 283, l. 14-25.

<sup>158</sup> TR p. 280, l. 8-14.; TR. p. 273, l. 24-p. 275, l. 4.

Complaint.<sup>159</sup> Mata concedes she told San Miguel, Jr. she “was not sure how far she wanted to pursue” the matter.<sup>160</sup> Mata told San Miguel, Jr. she simply wanted to make sure she had no further problems with Harris, that she could get training, and wanted an increased pay scale.<sup>161</sup> San Miguel, Jr. explained that Mata did not qualify for an increased pay scale and that he was concerned about having his father mentioned in connection with a matter he had no involvement.<sup>162</sup> Mata stated that was not her desire and asked “what was the next best thing.”<sup>163</sup> San Miguel, Jr. told Mata he believed her concerns had been addressed during and as a result of the July 2016 meetings.<sup>164</sup> Mata indicated she had, in fact, obtained the desired training.<sup>165</sup> Mata told San Miguel, Jr. she was considering withdrawing the charges.<sup>166</sup> San Miguel, Jr. shared this with Larry Sopchak, Local 28’s President.<sup>167</sup> Local 28 did provide information to Mata about who she needed to speak with concerning withdrawing the charges but engaged in no other conduct concerning Mata’s stated intent.<sup>168</sup>

Mata admits San Miguel, Jr. did not offer anything in exchange for dropping Mata’s charge against Local 28.<sup>169</sup> There was no *quid pro quo*. Local 28 did not ask San Miguel, Jr. to convince Mata to withdraw the charge.<sup>170</sup> San Miguel, Jr. was under no impression that anyone with Local 28 directed him to obtain a withdrawal.<sup>171</sup> Local 28

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<sup>159</sup> GC Ex. 1(c) ¶ 6; TR p. 274, l. 18-23.

<sup>160</sup> TR p. 138, l. 4-8.

<sup>161</sup> TR p. 274, l. 4-12.

<sup>162</sup> TR p. 274, l. 11-20; Pay rate is a contractual matter which is not controlled by Local 28. TR p. 189, l. 6-p. 190, l. 2; TR p. 190, l. 11-14; RESP Ex. 22.

<sup>163</sup> TR p. 274, l. 21-23.

<sup>164</sup> TR p. 274, l. 24-p. 275, l. 7.

<sup>165</sup> TR p. 275, l. 1-5; RESP Ex. 2.

<sup>166</sup> TR p. 276, l. 9.

<sup>167</sup> TR p. 221, l. 5-19.

<sup>168</sup> TR p. 221, l. 20-p. 222, l. 8.

<sup>169</sup> TR p. 71, l. 25-p. 72, l. 3.

<sup>170</sup> TR p. 276, l. 23-p. 277, l. 1; TR p. 219, l. 10-25.

<sup>171</sup> TR p. 277, l. 2-5.

was specifically told that any such decision was up to Mata and that Local 28 was not to be involved.<sup>172</sup>

To counter the lack of evidence supporting a coercion claim, the General Counsel asserts San Miguel, Jr took a job dispatch from Mata. Again, Mata provided no corroborating evidence of this alleged “action.”

San Miguel, Jr. has no recollection of such an “action.” San Miguel, Jr. testified that on occasion an individual might accept a job they should not.<sup>173</sup> Such occasions include when an individual is subject to a non-referral.<sup>174</sup> If an individual is discovered to have worked while under a non-referral, the individual may be suspended from working for three days for each day worked in addition to a mandatory thirty day suspension from the industry.<sup>175</sup> San Miguel, Jr. testified that if a work ticket was taken from Mata, it may have been due to a non-referral.<sup>176</sup>

Mata did, in fact, have non-referrals at just the time she claims San Miguel, Jr. took a job from her, February 2017.<sup>177</sup> On January 10, 2017, Mata had an incident at Ceres/Gulf Winds requiring her to take a Yard Tractor refresher course.<sup>178</sup> On January 25, 2017, the Joint Productivity Review Committee (“JPRC”) upheld the non-referral until Mata completed the course.<sup>179</sup> Mata completed the course on February 1, 2017.<sup>180</sup> On February 14, 2017, Mata was involved in another incident which resulted in a second non-referral to Ceres/Gulf Winds.<sup>181</sup> The next day, February 15, 2017, Mata received yet

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<sup>172</sup> TR p. 2221, l. 20-p. 222, l. 8.

<sup>173</sup> TR p. 260, l. 11-14; p. 261, l. 1-18.

<sup>174</sup> TR p. 261, l. 6-18.

<sup>175</sup> TR p. 208, l. 17-p. 209, l. 1.

<sup>176</sup> TR p. 263, l. 14-18.

<sup>177</sup> TR p. 72, l. 15-19; TR p. 73, l. 8-23; GC Exceptions p. 7.

<sup>178</sup> RESP Ex. 11 p. ILA28-000006.

<sup>179</sup> RESP Ex. 11 p. ILA28-000010.

<sup>180</sup> RESP Ex. 2.

<sup>181</sup> RESP Ex. 11 p. ILA28-000007.

another non-referral to Ceres/Gulf Winds due to another incident.<sup>182</sup> Mata had another incident on February 21, 2017 at Ceres/Gulf Winds.<sup>183</sup> On March 1, 2017, the JPRC upheld the penalty requested by Ceres/Gulf Winds, a non-referral.<sup>184</sup> Mata has not worked at Ceres/Gulf Winds since February 21, 2017.<sup>185</sup> Given Mata's multiple non-referrals during February 2017, the evidence supports the conclusion that, rather than being coercive, any alleged withdrawal, if one occurred, resulted from Mata's multiple non-referrals.

The ALJ is entirely within his authority to, just as he did, discount Mata's claims and give credence to the testimony offered by San Miguel, Jr. and others. Put simply, once again, the General Counsel failed to provide credible evidence supporting Mata's coercion claim and, as a result, the ALJ determined no violation of the Act occurred.

#### **IV. Conclusion**

The General Counsel was required to establish its claims by a preponderance of the credible evidence.<sup>186</sup> The General Counsel did not do so. The ALJ made the only decision possible in this matter, "The Union did not violate the Act in any manner alleged in the complaint."<sup>187</sup> As a result, and despite the General Counsel's exceptions to the dismissal, the ALJ properly dismissed the Complaint.<sup>188</sup> The Board should deny the General Counsel's Exceptions and uphold the Administrative Law Judge's Order dismissing the Complaint in its entirety.

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<sup>182</sup> RESP. Ex. 11 p. ILA28-000008.

<sup>183</sup> RESP Ex. 11 p. ILA28-000009.

<sup>184</sup> RESP Ex. 11 p. ILA28-000011.

<sup>185</sup> RESP Ex. 7, p. ILA28-000147.

<sup>186</sup> 22 C.F.R. § 1423.18; *Aerospace Industrial Dist. Lodge 751*, 270 N.L.R.B. 1059 (1984).

<sup>187</sup> ALJ Decision p. 7, l. 23.

<sup>188</sup> GC Exception 5, p. 2. Because Exception 5 is a general exception presented without specific basis, it is not independently addressed. However, as is apparent from the discussion in this Response, the Complaint was properly dismissed.

## **V. Prayer**

WHEREFORE, PREMISES CONSIDERED, International Longshoremen's Association Local 28 respectfully requests the National Labor Relations Board deny Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision, affirm the rulings, findings, and conclusions of the Administrative Law Judge, and adopt the Order of the Administrative Law Judge in its entirety. International Longshoremen's Association Local 28 additionally respectfully requests such additional relief to which it may be entitled.

**CERTIFICATE OF SERVICE**

This is to certify that on the 15<sup>th</sup> day of August , 2017, the undersigned attorney affirms under penalty of perjury that he caused a true and correct copy of International Longshoremen's Association Local 28's Response to Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of the Response to be electronically filed using the National Labor Relations Board Region 16's website and thereafter served the following by United States First-Class Mail in a postage pre-paid properly addressed envelope at the following addresses designated for such purpose or, as where indicated, via e-mail.

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*/s/ Bruce Johnson*  
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